

## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

KASSIM SAIB (COUNTER-PETITIONER), APPELLANT,

v.

LUIS (PETITIONER), RESPONDENT.\*

*Execution of decree—Payment of decree amount by one defendant—Reversal of decree on appeal by another defendant—Right to refund—Civil Procedure Code, s. 583.*

In a suit for rent, together with interest thereon, brought by a mortgagee against a tenant in occupation of the mortgage premises, one claiming title against the mortgagee was joined as second defendant. The suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint: and in execution the principal amount of the rent claimed, which had been paid into Court by the first defendant with the request that it should be paid out to the person entitled to it was paid over to the plaintiff. The first defendant preferred a second appeal against the decree, so far as it awarded interest and costs: this second appeal was dismissed. The second defendant, however, preferred against the entire decree a second appeal which was successful, and the High Court dismissed the suit throughout. On an application by the first defendant for refund of the money paid by him as stated above:

*Held*, that the applicant was not entitled to the refund claimed.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in civil miscellaneous appeal No. 51 of 1891, confirming the order of U. Babu Rau, District Munsif of Udipi, in civil miscellaneous petition No. 493 of 1891.

In 1886 a suit was brought by a plaintiff, since deceased and now represented by the respondent to the above petition, to receive from J. Luis, the present petitioner, a sum of money on account of rent accrued due on certain land in the defendant's possession. The plaintiff claimed to be the mortgagee of the land in question from the late trustee of the Puttigi Mutt. The trustee who had succeeded to office at the time of the suit, and who had been included in the suit as the second defendant, disputed the validity of the mortgage and claimed to be entitled to the rent in question. The Court of first instance passed a decree dismissing the suit, but this decree was reversed by the District Court and in execution of the appellate decree, the

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\* Appeal against Appellate Order, No. 36 of 1892.

plaintiff received out of Court a sum, which had been paid in by Luis as the principal sum with the request that it should be paid out to the party entitled to it. Against the decree of the District Court, however, Luis preferred a second appeal, on the ground that he was not liable to pay interest and costs: and the second defendant preferred a second appeal against the appellate decree in its entirety impleading both the plaintiff and Luis. Luis' second appeal was dismissed, but on the second appeal preferred by second defendant, the High Court restored the original decree in the suit by which, as above stated, the suit was dismissed.

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The present petition was preferred by Luis to recover the sum paid by him under the circumstances appearing above. Both the Lower Courts held that he was entitled to the refund claimed. The representative to the plaintiff preferred this second appeal.

The further facts of the case appear sufficiently for the purposes of this report from the judgment of Mr. Justice Best.

*Narayana Rau* for appellant.

*Ranga Rau* for respondent.

BEST, J.—This is an appeal against an order of the District Judge, directing the appellant, who was plaintiff in the suit, to refund to the respondent, who was the first defendant, money paid by the latter on account of rent admittedly due on the land, of which respondent was tenant. The land belongs to the Pattigi Mutt at Udipi, and had been mortgaged to the appellant by Sumatindra Swami as trustee of the Mutt. The validity of Sumatindra's appointment to the trusteeship was under litigation at the time of the mortgage, and was eventually decided against him. The rent, in question, was claimed also by Sudindra Swami, who was eventually declared the rightful trustee. He was consequently included as second defendant in the suit. The money was deposited in Court by the respondent with the request that it might be paid to whichever of the claimants might be found entitled to it. The Court of first instance dismissed the plaintiff's, *i.e.*, appellant's suit, but on appeal that decision was reversed, and thereupon the money was paid to appellant. But in second appeal preferred by Sudindra Swami, the second defendant in the suit, this Court reversed the decree of the Lower Appellate Court and restored that of the District Munsif. Hence the application out of which the present appeal has arisen, for restitution to first defendant of the money wrongly paid to plaintiff. The District

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Court has upheld the order of the District Munsif in favour of the respondent, and from that order this second appeal is preferred by the plaintiff.

It is contended on behalf of appellant that respondent is not entitled to restitution under section 583 of the Code of Civil Procedure, as there is no decree in his favour, he not having been an appellant, but merely a respondent (jointly with the present appellant) in the second appeal No. 657 of 1889, in which was passed this Court's decree dismissing the present appellant's suit; whereas the appeal (second appeal No. 778 of 1889) preferred by this respondent from the same decree (which appeal was dismissed) related only to interest and costs.

The contention on behalf of appellant is that the respondent "was not declared entitled to any benefit under any decree so as to claim restitution." I do not understand this contention to mean that restitution can only be made under section 583 of the Code, in cases in which it is expressly directed by the decree; such a contention would clearly be bad. *Balvantrav Oze v. Sadrudin*(1). I understand the contention on behalf of appellant to be that respondent is not entitled to the restitution sought, as there is *no decree whatever in his favour*. This contention is, I think, valid. The decree in second appeal No. 657 of 1889 was a decree in favour of the second defendant in that suit; and if, as the result of that decree, it happens that the money was wrongly paid to the present appellant, it is for that second defendant to ask the Court to get it back and pay it to himself as the party entitled to the same, it having been paid into Court by this respondent for payment to whichever of the two claimants before it in the same suit might be found entitled to the same.

Respondent having paid the money into Court in a suit to which both the claimants were parties, is fully discharged from all liability; and in the absence of a decree in his favour, he is entitled to no refund from the appellant. I would, therefore, allow the appeal and, setting aside the order of both the Courts below, dismiss respondent's application with costs throughout.

MUTTUSAMI AYYAR, J.—I agree. The payment was not made into Court under chapter XXIII of the Code of Civil Procedure, for such payment pre-supposes an admission of the plaintiff's

(1) I.L.R., 13 Bom., 485.

claim to the extent of the payment. In the present case the payment was made with the request that the money should be paid out to the party really entitled to the rent. It is a payment made under the impression that the suit though brought by the plaintiff might be treated as being in the nature of an interpleader proceeding under section 490, Civil Procedure Code. The Munsif was wrong in ordering the money to be paid out to the plaintiff without security before the decision of the second appeal, and the party entitled to put him in motion in order to rectify this error, and to call for a refund is the second defendant. The first defendant is, therefore, not entitled to ask for a refund, and I concur in the order proposed by my learned colleague.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

RAMACHANDRA AND OTHERS (PLAINTIFFS), PETITIONERS,

v.

SESHA (DEFENDANT), RESPONDENT.\*

1893.  
Apr. 20, 24, 27.

*Negotiable Instruments Act—Act XXVI of 1861, s. 13—Promissory note—Reference in the note to collateral security, effect of.*

An instrument, signed and bearing a 1-anna stamp, was in the following terms, viz., “on deposit of title-deeds named herein-below for value received by me I promise to pay three months after date Rs. 160 to A.B. or order,” then followed the details of the title-deeds :

*Held*, that the instrument was a negotiable instrument.

PETITION under Provincial Small Cause Courts' Act, s. 25, praying the High Court to revise the proceedings of G. Ramasami Ayyar, District Munsif of Coimbatore, in small cause suit No. 213 of 1892.

The plaintiffs, who carried on business in partnership, under the name of Srinivasa and Company, sued to recover principal and interest due under an instrument signed by the defendant and dated 13th October 1827. The instrument in question

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\* Civil Revision Petition No. 646 of 1892.